Supreme Court, U.S.
FILED
MAR 4 1991
OFFICE OF THE CLERK

(2)

No. 90-1064

In the Supreme Court of the United States

OCTOBER TERM, 1990

JAMES B. RUTLAND, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

KENNETH W. STARR
Solicitor General
JAMES F. RILL
Assistant Attorney General
JUDY L. WHALLEY
Deputy Assistant Attorney General
JOHN J. POWERS, III
ANDREA LIMMER
Attorneys

Department of Justice
Washington, D.C. 20530
(202) 514-2217

BEST AVAILABLE COPY

QUESTIONS PRESENTED

1. Whether the district court erred in instructing the jury on the defense of withdrawal from a conspiracy.

2. Whether petitioner was properly convicted of violating the Sherman Act because of his involvement in a bid-rigging scheme.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Statement	1
Argument	5
Conclusion	10

TABLE OF AUTHORITIES

Cases:

Catalano, Inc. v. *Target Sales, Inc.*, 446 U.S. 643 (1980)	9
FTC v. *Superior Court Trial Lawyers Ass'n*, 110 S. Ct. 768 (1990)	9
Martin v. *Ohio*, 480 U.S. 228 (1987)	6
National Society of Professional Engineers v. *United States*, 435 U.S. 679 (1978)	9
Palmer v. *BRG of Georgia, Inc.*, 111 S. Ct. 401 (1990)	9
Patterson v. *New York*, 432 U.S. 197 (1977)	5
United States v. *Borelli*, 336 F.2d 376 (2d Cir. 1964)	5
United States v. *Patel*, 879 F.2d 292 (7th Cir. 1989), cert. denied, 110 S. Ct. 1318 (1990)	5
United States v. *Read*, 658 F.2d 1225 (7th Cir. 1981)	5, 6
United States v. *United States Gypsum Co.*, 438 U.S. 422 (1978)	4, 6

Statutes:

Sherman Act, 15 U.S.C. 1	2
18 U.S.C. 1341	2

In the Supreme Court of the United States

OCTOBER TERM, 1990

No. 90-1064

JAMES B. RUTLAND, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 16a-37a) is reported at 907 F.2d 489.

JURISDICTION

The judgment of the court of appeals was entered on July 23, 1990. A petition for rehearing was denied on October 9, 1990. Pet. App. 38a. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

On November 3, 1988, a grand jury in the Eastern District of Louisiana indicted MMR Corporation, its Chairman, Robert P. McCracken, and its President, petitioner. The

defendants were each charged with one count of violating the Sherman Act, 15 U.S.C. 1, and three counts of mail fraud, 18 U.S.C. 1341, for agreeing to rig the bids on the electrical construction portion of a power station known as "Big Cajun" Unit 3 near New Roads, Louisiana. The jury convicted petitioner and MMR on all counts and acquitted McCracken. Petitioner was sentenced to six months' imprisonment and fined a total of $103,000. The court of appeals affirmed. Pet. App. 1a-12a, 16a-37a.

1. In March 1980, representatives of several large electrical contractors, including Fischbach and Moore, Inc., had a meeting at which they discussed allocating future electrical projects. Fischbach expressed interest in the Big Cajun Unit 3 project and, over the next several months, was successful in persuading the other large contractors to agree to rig the bids on that project in its favor. Fischbach, however, could not proceed with its plan to rig the bids without the cooperation of petitioner's company, MMR. MMR previously had performed work for Cajun Electric and had persuaded Cajun engineers to put MMR on the bid list along with other companies that had demonstrated the financial and technical capability to perform the electrical portion of the Unit 3 contract. MMR had taken out plans for the project and had sent representatives to a meeting with Big Cajun engineers on December 16, 1980. Pet. App. 17a-18a.

On December 19, 1980, Paul Murphy, a regional vice-president of Fischbach, and J.R. Sturgill, another Fischbach official, met with petitioner and MMR's chairman Robert McCracken. Murphy told petitioner and McCracken that the other bidders on the Big Cajun project had agreed to rig the job in favor of Fischbach if MMR would also agree. Petitioner expressed his strong belief that MMR could do the work. He suggested that MMR and Fischbach perform the job as a joint venture, but Murphy would not agree to that proposal. After petitioner and Murphy went to the

men's room, however, they reported that they had struck a deal. MMR agreed to help Fischbach win the contract; in exchange, MMR would receive a subcontract for a portion of the work at a substantial markup. Pet. App. 18a-19a.

On January 14, 1981, two days before the bids were due, petitioner and his chief estimator came to Fischbach's offices to give Fischbach their cost estimates.[1] After discussing their cost estimates, they agreed that the actual cost of the job would be approximately $17 million. Fischbach decided to put in a bid of over $21 million and directed MMR to make an even higher bid. Because Fischbach was aware of MMR's good relationship with Cajun Electric and was afraid that Cajun Electric might select MMR if MMR's bid was too close to Fischbach's, Murphy decided that MMR should be the highest bidder. Petitioner, however, said that he would be embarrassed to submit a price that was so much higher than his estimate. To avoid that embarrassment, MMR did not submit any bid. On January 15, the day before the bids were due, petitioner wrote a letter to Cajun Electric telling it that MMR would not submit a bid, but instead would seek work as a subcontractor. Pet. App. 18a-20a, 22a n.2.[2]

Fischbach won the contract and, pursuant to its agreement, awarded MMR a subcontract for $4.3 million, which included a $1.5 million "fee" on top of MMR's cost of $2.8 million. The subcontract price that was submitted to Cajun

---

[1] Murphy had asked MMR to prepare a legitimate cost estimate so that he could be sure that Fischbach had not made any mistakes in its estimates. Pet. App. 19a.

[2] Petitioner's letter stated that it would "quote certain areas of the project as a subcontractor * * * to all prospective bidders." GX 10. In fact, there was no evidence that MMR submitted subcontractor quotes to any bidder other than Fischbach. 27 Tr. 91-92, 103-106, 133-135.

Electric, however, was only $3.3 million. The remaining $1 million was paid to MMR in the form of a fictitious change order purporting to reflect additional work on the project after it was under way. Pet. App. 20a.

2. The court of appeals affirmed. It declined to consider petitioner's claim that the trial court's instructions on withdrawal were deficient for failing explicitly to state that, once evidence of withdrawal was established, the burden was on the government to disprove withdrawal beyond a reasonable doubt. Pet. App. 31a-32a. Rather, the court held that the defendants were not entitled to a withdrawal instruction because there was no evidence to support it. *Id.* at 32a. The evidence on which the defendants had relied to show withdrawal – the letter to Cajun Electric notifying it of MMR's decision not to bid – was "hardly inconsistent with the object of the conspiracy." *Ibid.*, citing *United States* v. *United States Gypsum Co.*, 438 U.S. 422, 464-465 (1978).

The court also held that MMR's alleged inability to obtain the bonding necessary to submit a bid was not a defense to the Sherman Act violation charged in the indictment. Pet. App. 25a-29a. Petitioner and MMR claimed that, because MMR could not obtain bonding, it was not a competitor of Fischbach and, therefore, a per se violation of the Sherman Act could not be found. The court of appeals rejected that argument. It pointed out that, even if MMR was not a competitor, Fischbach and two other companies in the bid-rigging scheme were competitors. MMR's alleged status as a noncompetitor is irrelevant because "a noncompetitor can join a Sherman Act bidrigging conspiracy among competitors." *Id.* at 28a. Moreover, even if MMR was "arguably unable in fact to carry out its competitive threat," it nevertheless furthered the conspiracy among competitors. Fischbach could not have proceeded with its plan to submit rigged bids unless it was confident that MMR

would not submit a competitive bid. By agreeing to participate in the conspiracy and later assisting Fischbach in the preparation of its rigged bid, MMR acted in furtherance of the conspiracy. *Id.* at 28a-29a.[3]

ARGUMENT

1. Petitioner claims that there is a conflict among the circuits on the question whether a defendant bears the burden of proving that he has withdrawn from a conspiracy, and that the conflict warrants review. Pet. 8-13. The court of appeals, however, found that this case did not require resolution of that issue because the evidence did not support giving a withdrawal instruction at all. Accordingly, the issue raised by petitioner is not presented by this case.[4]

---

[3] The court of appeals also rejected numerous other arguments made by petitioner and MMR, including challenges to the sufficiency of the evidence (Pet. App. 21a-23a), the trial court's unanimity instruction (*id.* at 25a), various evidentiary rulings (*id.* at 23a-25a, 29a-31a, 32a-34a), and alleged prosecutorial misconduct (*id.* at 34a-37a). Petitioner does not renew any of those arguments in this Court. He filed, however, a motion for a new trial alleging prosecutorial misconduct; the district court denied the motion, and petitioner's appeal from that ruling is pending in the court of appeals.

[4] In claiming a conflict on the issue that the court did not reach, petitioner relies primarily on the Seventh Circuit's decision in *United States* v. *Read*, 658 F.2d 1225 (1981), and maintains that that decision is in conflict with decisions from almost all the other courts of appeals. Pet. 8-9. We note that *Read* was not mentioned in a recent Seventh Circuit decision, which observed that "the burden of withdrawal lies on the defendant." *United States* v. *Patel*, 879 F.2d 292, 294 (7th Cir. 1989) (quoting *United States* v. *Borelli*, 336 F.2d 376, 388 (2d Cir. 1964) (Friendly, J.)), cert. denied, 110 S. Ct. 1318 (1990). Petitioner also relies on *Patterson* v. *New York*, 432 U.S. 197 (1977); in *Patterson*, however, this Court expressly "decline[d] to adopt as a constitutional imperative * * * that a State must disprove beyond a reasonable doubt every fact constituting any and all affirmative defenses related to the culpability

Withdrawal from a conspiracy requires " '[a]ffirmative acts inconsistent with the object of the conspiracy and communicated in a manner reasonably calculated to reach co-conspirators.'" Pet. App. 32a, quoting *United States* v. *United States Gypsum Co.*, 438 U.S. 422, 464 (1978). The courts of appeals are in agreement that the burden of going forward with the evidence of withdrawal is on the defendant. See Pet. App. 32a; *United States* v. *Read*, 658 F.2d 1225, 1236 (7th Cir. 1981). Petitioner's withdrawal argument is based on the letter that MMR sent to Cajun Electric shortly before the bid letting in which MMR stated that it was not going to submit a bid. Pet. 7. As the court of appeals observed, however, that letter was entirely consistent with the ultimate objective of the conspiracy. Pet. App. 32a. Fischbach organized the conspiracy and then recruited MMR to join it because Fischbach wanted to be the winning bidder for the Unit 3 project. Pet. App. 18a. MMR's ultimate agreement not to submit a bid eliminated it as a potential successful bidder and guaranteed the success of the conspiracy. Indeed, by falsely suggesting in the letter to Cajun that MMR was submitting "competitive" subcontract quotes to all the other bidders (GX 10), when in fact MMR had agreed to an exclusive arrangement with Fischbach, the letter affirmatively furthered the conspiracy by deceiving the bidding authorities.[5] Moreover, petitioner continued to participate in the conspiracy after the bid

---

of an accused," *id.* at 210, and upheld a conviction where the jury had been instructed that the burden of proving the defense of extreme emotional disturbance was on the defendant. See also *Martin* v. *Ohio*, 480 U.S. 228 (1987).

[5] The letter was not inconsistent with the agreement to help Fischbach win the contract; it did not defeat the purpose of the conspiracy to enable Fischbach to be the low bidder; it was not calculated to disclose the bid-rigging scheme to the authorities; and it was not even calculated to "reach co-conspirators" to advise them of MMR's withdrawal. See *United States Gypsum Co.*, 438 U.S. at 464-465.

date by negotiating with Fischbach for MMR's payoff on the lucrative subcontract and by receiving that payoff. See Pet. App. 20a, 23a.

Under these circumstances, the court of appeals correctly concluded that petitioner was not entitled to an instruction on the affirmative defense of withdrawal. Pet. App. 32a. Because petitioner was not entitled to an instruction on that issue, the court of appeals did not have to consider the question of who should bear the burden of proof on the issue of withdrawal. Accordingly, the result in this case would be the same even if petitioner were correct in asserting that the government must bear the burden of proof on the affirmative defense of withdrawal from a conspiracy.[6]

---

[6] We disagree with the court of appeals' observation (Pet. App. 31a n.3) that the district court's jury instructions placed the burden of proof on the withdrawal issue on the defendants. The district court instructed that "[a] person can withdraw from a conspiracy by taking some affirmative steps to terminate or abandon his participation in, and efforts to promote, the conspiracy. In other words, the defendant must have demonstrated some type of positive action which disavowed or defeated the purpose of the conspiracy. Mere cessation of activity does not constitute withdrawal." 48 Tr. 74. The court also instructed the jury that "there is no requirement that a defendant try to convince the other co-conspirators to abandon their undertaking, or that he go to public authorities or others to expose the conspiracy or to prevent the carrying out of an act involved in the conspiracy." *Id.* at 75. The court then "reminded [the jury] that the burden remains on the government to prove, beyond a reasonable doubt, that the defendants were members of the conspiracy." *Ibid.* If "it affirmatively appears from the evidence that [a defendant] in good faith disavowed and completely withdrew from any participation in the conspiracy * * * * prior to November 3, 1983 [the period of the statute of limitations], you must find them not guilty." *Id.* at 76. Finally, the court stated that the jury could not "find any of the defendants guilty unless the government proves, beyond a reasonable doubt, that the defendants were members of the charged conspiracy sometime within the period beginning November 3, 1983, and ending November 3, 1988." *Id.* at 76-77. Thus, the court never

2. Petitioner claims that he was improperly convicted of illegal bid-rigging on a per se theory (Pet. 13-23), but that claim rests on erroneous assumptions of fact and law.

Petitioner first contends that "[u]nder the holding of this case, companies that cannot bid on the prime contract and elect to bid as subcontractors are subjected to *per se* scrutiny under the Sherman Act." Pet. 17. Petitioner's suggestion that his conduct was nothing more than the routine conduct of a subcontractor is belied by the evidence presented at trial and relied on by the court of appeals. By its verdict, the jury found that petitioner and MMR had agreed with Fischbach and others to rig the bids on the Unit 3 project. Pet. App. 23a.[7] As a payoff for its participation in the conspiracy, MMR received a "lucrative subcontract" from Fischbach. Pet. App. 23a. This case does not involve a legitimate subcontracting agreement but rather conduct in furtherance of a per se illegal bid-rigging agreement. Petitioner's observations on the virtues of legitimate subcontracting (Pet. 15-19) are therefore irrelevant.[8]

---

charged that the defendants bore the burden of proving withdrawal. To the contrary, the court emphasized throughout the charge that "[t]he government has the burden of pro[v]ing every element of the charges beyond a reasonable doubt, and if it fails to do so, you must find the defendants not guilty." *Id.* at 36; see also *id.* at 64-65, 75-77, 84.

[7] The jury was instructed that petitioner could be found guilty only if the bid-rigging conspiracy charged in the indictment existed, and that petitioner knowingly joined that conspiracy. 48 Tr. 63-66, 70. The court instructed the jury (1) that it could not convict if the decision not to submit a bid was the result of an independent business decision (*id.* at 69); (2) that discussions and exchanges of information with Fischbach were not illegal in the absence of an agreement to rig a bid (*id.* at 70); and (3) that, in deciding whether the alleged bid-rigging conspiracy existed, the jury could consider whether MMR was capable of submitting a bid and whether it had actually submitted a bid. *Id.* at 68-69.

[8] Indeed, the conspiracy of which petitioner was convicted undermines the very process that petitioner extols. Not only did petitioner

In suggesting that his conduct "promoted competition" and efficiency (Pet. 14, 19, 20-21), petitioner fails to provide any pro-competition justification for the blatant bid-rigging in which he engaged. Price fixing is "the archetypal example" of conduct that is "illegal without further examination under the rule of reason generally applied in Sherman Act cases." *Catalano, Inc.* v. *Target Sales, Inc.*, 446 U.S. 643, 646-647 (1980) (per curiam). See also *FTC* v. *Superior Court Trial Lawyers Ass'n*, 110 S. Ct. 768, 780-781 (1990); *National Society of Professional Engineers* v. *United States*, 435 U.S. 679, 692 (1978); accord *Palmer* v. *BRG of Georgia, Inc.*, 111 S. Ct. 401, 402 (1990) (per curiam). Petitioner's attempt to provide an efficiency rationale for his conduct fails to address this fundamental principle.

Petitioner also renews his claim that he cannot be liable for a per se violation because MMR purportedly lacked adequate bonding capacity for the bid and thus was not a viable competitor of Fischbach. Pet. 21-23. This contention is also unavailing. Even if petitioner's characterization of the record is accepted,[9] petitioner did not participate only in an agree-

---

and Fischbach rig the prime contract, but they subverted competitive bidding on the subcontract as well. Compare Pet. 15-19. Fischbach did not award the electrical subcontract on the basis of competitive bids; it did not choose from among a host of prospective subcontractors in order to select a "subcontract bid that represents the most efficient combination of [various market factors]." Pet. 18. Fischbach agreed to award MMR the subcontract as a payoff for helping Fischbach rig a bid, even though MMR did not submit the lowest price of all the subcontractors (17 Tr. 73; 32 Tr. 52-53, 58; 33 Tr. 85-86), and even though it meant paying MMR a huge markup on the subcontract.

[9] The evidence does not support petitioner's premise that it could not have obtained adequate bonding for the Big Cajun project. While Aetna did deny MMR's request for a large bond, MMR did not try to secure bonding or credit from other sources that had expressed a willingness to help MMR (42 Tr. 192-193; 43 Tr. 22, 46), nor did it appeal to Aetna to reconsider its decision. Indeed, only a few months after the bid

ment between non-competitors. As the court of appeals explained, petitioner participated in and facilitated a conspiracy between competitors. See Pet. App. 28a-29a. MMR, moreover, clearly posed a "competitive threat," even if it was unable to carry out the threat, and its agreement to participate in the bid-rigging scheme was essential to ensuring the scheme's success. *Ibid.* Petitioner's assertion that his participation in the bid-rigging conspiracy was "meaningless" (Pet. 21) is thus plainly incorrect. Accordingly, the court of appeals correctly determined that petitioner was subject to per se liability for his role in the price-fixing scheme.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

KENNETH W. STARR
Solicitor General
JAMES F. RILL
Assistant Attorney General
JUDY L. WHALLEY
Deputy Assistant Attorney General
JOHN J. POWERS, III
ANDREA LIMMER
Attorneys

MARCH 1991

---

date, Aetna increased MMR's bond limit for another project (42 Tr. 117-120, 125-126), thus suggesting that MMR might have persuaded Aetna to raise its bonding limits on the Big Cajun project. MMR did not pursue any of those alternatives.

U.S. GOVERNMENT PRINTING OFFICE 1991--282-061/20417